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19 Attorneys for IN-N-OUT BURGERS, a California Corp.

20 **UNITED STATES DISTRICT COURT**  
 21 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

22 IN-N-OUT BURGERS, a California  
 23 Corporation,

24 Plaintiff,

25 v.

26 SAI M. ONG, an individual d/b/a  
 27 “IN N OUT SMOG CHECK,” BO  
 28 TRAN, an individual d/b/a “IN &  
 29 OUT SMOG CHECK,” PHI L. LE,  
 30 an individual d/b/a “IN-N-OUT

Case No. **C07 05453 JL**

**COMPLAINT FOR TRADEMARK  
 INFRINGEMENT**

**JURY TRIAL DEMANDED**

ORIGINAL  
 FILED  
 OCT 26 2007  
 NORTHERN DISTRICT OF CALIFORNIA  
 RICHARD J. WILKINS, CLERK  
 SAN JOSE, CALIFORNIA

1 SMOG CHECK," MAN Q. DINH,  
2 an individual d/b/a "IN N OUT  
3 SMOG CHECK,"

4 Defendants.

5

6

7 Plaintiff IN-N-OUT BURGERS, a California Corporation, (herein after "IN-  
8 N-OUT BURGERS"), by and through its undersigned counsel, hereby files its  
9 Complaint against Defendants SAI M. ONG, an individual d/b/a "IN N OUT  
10 SMOG CHECK", located at 226 Phelan Avenue #F, San Jose, California 95112;  
11 BO TRAN, an individual d/b/a "IN & OUT SMOG CHECK", located at 1295 West  
12 San Carlos Street, San Jose, California 95126; PHI L. LE, an individual d/b/a "IN-  
13 N-OUT SMOG CHECK", located at 490 Keyes Street, San Jose, California 95112;  
14 and MAN Q. DINH, an individual d/b/a "IN N OUT SMOG CHECK", located at  
15 735 South 1st Street, Unit A, San Jose, California 95113 (collectively  
16 "Defendants"). In support of its Complaint, Plaintiff IN-N-OUT BURGERS  
17 alleges as follows:

18 1. This action concerns Defendants' Trademark Infringement and  
19 Unfair Competition under The Lanham Act, Trademark Infringement and Unfair  
20 Competition under California Statutory and Common Law, and Trademark Dilution  
21 under California Law.

22 **PARTIES**

23 2. Plaintiff IN-N-OUT BURGERS is a California corporation with its  
24 principal place of business in Irvine, California.

25 3. Defendants SAI M. ONG, BO TRAN, PHI L. LE, and MAN Q. DINH,  
26 individuals, are California residents who, in concert or alone, own and operate  
27 emissions control and smog checking service centers in California doing business  
28 under the trade names "IN-N-OUT SMOG CHECK", "IN N OUT SMOG

1 CHECK", "IN AND OUT SMOG CHECK" and/or "IN & OUT SMOG CHECK."  
2 Defendants reside and/or have business addresses at the following locations:

3 a. Upon information and belief, Defendant SAI M. ONG  
4 is an individual residing at 2555 Glen Anna Way, San Jose, California 95148 and  
5 doing business as "IN N OUT SMOG CHECK" located at 226 Phelan Avenue  
6 #F, San Jose, California 95112.

7 b. Upon information and belief, Defendant BO TRAN is  
8 an individual residing at 2555 Glen Anna Way, San Jose, California 95148 and  
9 doing business as "IN & OUT SMOG CHECK" located at 1295 West San Carlos  
10 Street, San Jose, California 95126.

11 c. Upon information and belief, Defendant PHI L. LE is  
12 an individual residing at 3114 Dakan Court, Unit #3, San Jose, California 95136  
13 and doing business as "IN-N-OUT SMOG CHECK" located at 490 Keyes Street,  
14 San Jose, California 95112.

15 d. Upon information and belief, Defendant MAN Q.  
16 DINH is an individual residing at 3114 Dakan Court, Unit #3, San Jose,  
17 California 95136 and doing business as "IN N OUT SMOG CHECK" located at  
18 735 South 1st Street, Unit A, San Jose, California 95113.

19 4. Upon information and belief, the individual defendants work together  
20 and operate their businesses as a group. Accordingly, the individual defendants and  
21 their businesses are referred to collectively herein as "IN-N-OUT SMOG CHECK"  
22 or "Defendants."

#### JURISDICTION AND VENUE

23 5. This Court may exercise jurisdiction over each of the Defendants  
24 because each Defendant regularly transacts business in California, and the causes of  
25 action alleged herein arose in whole or in part in California.  
26  
27

6. This Complaint alleges claims under the Lanham Act, making jurisdiction proper in this Court pursuant to Title 28 U.S.C. §§ 1331, 1338, and 1367. This Complaint alleges claims under §§32 and 43 of the Lanham Act. The Complaint also alleges State Law claims under California Law that are so related to the Federal Question Claim under The Lanham Act that they form part of the same case and controversy, thereby making the exercise of Supplemental Jurisdiction under Title 28 U.S.C. § 1367 appropriate.

7. Venue is proper in this District pursuant to Title 28 U.S.C. § 1391(b) because each of Defendants resides within this Judicial District and conducts substantial business in this Judicial District.

8. Venue also is properly laid in this Judicial District pursuant to Title 28 U.S.C. § 1391(b) on the ground that the infringing acts alleged herein arose, in whole or in part, within this Judicial District. Defendants advertise goods and services bearing the infringing Trademark in this Judicial District.

## **BACKGROUND – THE BUSINESS OF PLAINTIFF**

9. Long prior to the acts complained of herein, IN-N-OUT BURGERS adopted and commenced use of the mark "IN-N-OUT". IN-N-OUT BURGERS has been engaged in the business of providing specially-prepared sandwiches to consumers in restaurants since at least as early as 1948.

10. IN-N-OUT BURGERS currently has over 200 locations throughout California and the southwestern United States, and plans to expand its restaurant operations to other states.

11. Since at least as early as 1960, IN-N-OUT BURGERS has used the mark "IN-N-OUT" in interstate commerce in connection with its advertising, promotion, offering to provide, and providing specially-prepared sandwiches and other goods and services to consumers both in its restaurants and through its automobile drive-through windows.

1           12. IN-N-OUT BURGERS owns all right, title, and interest in and to the  
 2 Mark "IN-N-OUT," and has obtained Federal Trademark and Service Mark  
 3 Registrations for the Mark "IN-N-OUT" for a wide range of food and other  
 4 products, including, inter alia, hamburger sandwiches and cheeseburger  
 5 sandwiches, French fried potatoes, hot coffee, milkshakes, bumper stickers,  
 6 backpacks, and coffee mugs. IN-N-OUT BURGERS' Federal Trademark and  
 7 Service Mark Registrations for the mark "IN-N-OUT" include:

<b>U.S.P.T.O.</b>			
<b><u>MARK</u></b>	<b><u>REGISTRATION No.</u></b>	<b><u>CLASS</u></b>	<b><u>DESCRIPTION OF SERVICES OR GOODS</u></b>
IN-N-OUT	2217307	IC 014	Watches
		IC 016	Decals in the nature of bumper stickers; publications in the nature of house organs; gift certificates.
		IC 018	Backpacks
		IC 021	Coffee mugs and thermal mugs
		IC 025	Shirts, baseball caps, letterman's jackets, and cooks aprons.
IN-N-OUT	2285823	IC 042	Computer services, namely, providing data bases in the field of restaurant services and in the field of retail and mail order merchandising services.
IN-N-OUT	1525982	IC 032	Lemonade and soft drinks for consumption on or off the premises.
		IC 030	Hamburger sandwiches and cheeseburger sandwiches, hot coffee, and milkshakes for consumption on or off the premises.
		IC 029	Milk and French fried potatoes for consumption on or off the premises.

1				
2			IC 042	Restaurant services and carry-out restaurant services.
3	IN-N- OUT	1522799	IC 029	Milk and French fried potatoes for consumption on or off the premises.
4			IC 030	Hamburger sandwiches and cheesburger sandwiches, hot coffee, and milkshakes for consumption on or off the premises.
5			IC 032	Lemonade and soft drinks for consumption on or off the premises.
6			IC 042	Restaurant services and carry-out restaurant services.
7			IC 029	Milk and French fried potatoes for consumption on or off the premises.
8			IC 032	Lemonade and soft drinks for consumption on or off the premises.
9			IC 042	Restaurant services and carry-out restaurant services.
10			IC 029	Milk and French fried potatoes for consumption on or off the premises.
11			IC 032	Lemonade and soft drinks for consumption on or off the premises.
12	IN-N- OUT	1101628	IC 042	Restaurant services and carry-out restaurant services.
13			IC 029	Milk and French fried potatoes for consumption on or off the premises.
14			IC 032	Lemonade and soft drinks for consumption on or off the premises.
15			IC 042	Restaurant services and carry-out restaurant services.
16	IN-N- OUT	1085163	IC 029	Milk and French fried potatoes for consumption on or off the premises.
17			IC 030	Cheesburgers, hamburgers, hot coffee and milkshakes for consumption on or off premises.
18	IN-N- OUT	1101638		
19				
20	IN-N-OUT BURGERS' seven (7) Federal Service Mark and Trademark			
21	Registrations relating to these services and products are attached hereto as Exhibits			
22	"A" through "G".			
23	13. In addition, IN-N-OUT BURGERS has been engaged in the interstate			
24	financial sponsorship of automobiles and the automobile racing industry since at			
25	least as early as 1985. IN-N-OUT BURGERS owns all right, title, and interest in			
26	and to the mark "IN-N-OUT BURGERS" and "IN-N-OUT BURGERS			
27	FOUNDATION" to the following Federal Service Mark Registrations relating to			
28				

1 the interstate financial sponsorship of automobiles and the automobile racing  
 2 industry:

<u>MARK</u>	<u>U.S.P.T.O. REGISTRATION NO.</u>	<u>CLASS</u>	<u>DESCRIPTION OF SERVICES OR GOODS</u>
IN-N-OUT BURGERS	2291183	IC 036	Financial Sponsorship of race cars and race car drivers
IN-N-OUT BURGERS FOUNDATION	2121178	IC 036	Financial Sponsorship of race cars and race car drivers
IN-N-OUT BURGERS FOUNDATION	2035491	IC 036	Financial Sponsorship of race cars and race car drivers

12       14. IN-N-OUT BURGERS' three (3) Federal Service Mark Registrations  
 13 relating to the interstate financial sponsorship of automobiles and the automobile  
 14 racing industry are attached hereto as Exhibits "H" through "J".

15       15. IN-N-OUT BURGERS makes use of its ten (10) Registered Marks in  
 16 interstate commerce by displaying its Registered Marks on product packaging,  
 17 menus, signage, promotional materials, race cars, and advertising media.

18       16. Since the date of First Use of the Registered Marks, IN-N-OUT  
 19 BURGERS has manifested the intent to maintain exclusive ownership of the  
 20 Registered Marks and to continue use of the Registered Marks in interstate  
 21 commerce in connection with IN-N-OUT BURGERS' products and services  
 22 offered for sale in restaurants in California and the southwestern United States.

23       17. IN-N-OUT BURGERS has invested millions of dollars in advertising  
 24 its Registered Marks in the United States in an effort to create a strong association  
 25 between IN-N-OUT BURGERS' products and services, good will, and its  
 26 Registered Marks.

27       18. The Registered Marks are strong, arbitrary marks that warrant broad  
 28 protection in both related and unrelated product and/or service classes.  
 7

1       19. As a result of the care and skill exercised by IN-N-OUT BURGERS in  
2 the conduct of its business, the high quality of IN-N-OUT BURGERS' products  
3 and services offered under its Registered Marks, and the extensive advertising, sale,  
4 and promotion of IN-N-OUT BURGERS' products bearing its Registered Marks,  
5 its Registered Marks have acquired Secondary Meaning in the United States,  
6 including in the State of California.

7       20. IN-N-OUT BURGERS was the first drive-through hamburger  
8 restaurant, opened in 1948, and since then, always has operated with the drive-  
9 through business at the core of its business concepts. IN-N-OUT BURGERS does  
10 not place its restaurants in shopping centers, ball parks, or other such locations that  
11 would detract from and which would not be conducive to the drive-in culture and  
12 experience.

13       21. Since its inception, IN-N-OUT BURGERS business model has  
14 focused on the car culture of California.

15       22. In keeping with the car culture business model, every year IN-N-OUT  
16 BURGERS creates and sells apparel featuring a cars.

17       23. By virtue of its drive-through operations and promotions, as well as its  
18 extensive sponsorship of race cars, IN-N-OUT BURGERS and its Registered  
19 Marks are closely tied to the automobile culture in California and throughout the  
20 country.

### **DEFENDANTS' INFRINGING ACTIVITIES**

22       24. Defendants own and/or operate automobile service centers at several  
23 locations in California, including at least the following: "IN N OUT SMOG  
24 CHECK" located at 226 Phelan Avenue #F, San Jose, California 95112; "IN &  
25 OUT SMOG CHECK" located at 1295 West San Carlos Street, San Jose, California  
26 95126; "IN-N-OUT SMOG CHECK" located at 490 Keyes Street, San Jose,  
27  
28

1 California 95112; and "IN N OUT SMOG CHECK" located at 735 South 1st  
2 Street, Unit A, San Jose, California 95113 ("Defendants' Locations").

3 25. Upon information and belief, each of the Defendants' Locations  
4 provides automobile services to consumers in Santa Clara County, California.

5 26. IN-N-OUT SMOG CHECK has used, and continues to use, the marks  
6 "IN-N-OUT," "IN N OUT," "IN AND OUT," and/or "IN & OUT" (each an  
7 "Infringing Mark") in providing automobile servicing services to consumers in  
8 Santa Clara County, California.

9 27. IN-N-OUT SMOG CHECK has advertised an Infringing Mark in  
10 California and this Judicial District.

11 28. Each Infringing Mark constitutes a colorable imitation of IN-N-OUT  
12 BURGERS' Registered Marks.

13 29. IN-N-OUT BURGERS did not authorize, and would never authorize,  
14 IN-N-OUT SMOG CHECK to use any of the Infringing Marks or any other  
15 colorable imitation of the Registered Marks.

16 30. IN-N-OUT BURGERS has asked IN-N-OUT SMOG CHECK to cease  
17 and desist from all present and future uses of any Infringing Mark or any colorable  
18 imitation of the Registered Marks. IN-N-OUT SMOG CHECK has refused.

19 **COUNT I – FEDERAL TRADEMARK INFRINGEMENT**

20 **TITLE 15 U.S.C. § 1114**

21 31. Paragraphs 1 - 30 are incorporated herein by reference.

22 32. IN-N-OUT BURGERS exclusively owns the Registered Marks.

23 33. IN-N-OUT BURGERS has used the Registered Marks in interstate  
24 commerce in connection with the advertising and promotion of its restaurant goods  
25 and services and financial sponsorship of automobiles and the automobile racing  
26 industry.

1       34. IN-N-OUT SMOG CHECK has used a colorable imitation of the  
 2 Registered Marks in interstate commerce in connection with the rendering of  
 3 automobile servicing services at its locations in California.

4       35. Upon information and belief, IN-N-OUT SMOG CHECK's  
 5 unauthorized use of a colorable imitation of the Registered Marks has caused, and  
 6 will likely cause, confusion, mistake, or deception in the relevant consumer market.

7       36. Upon information and belief, IN-N-OUT SMOG CHECK's  
 8 unauthorized use of colorable imitations of the Registered Marks constitutes  
 9 Trademark Infringement in violation of Title 15 U.S.C. §§ 1114 and 1117.

10      37. IN-N-OUT SMOG CHECK acted in bad faith and/or willfully in  
 11 adopting a colorable imitation of the Registered Mark in connection with the sale of  
 12 the Infringement Product in an effort to reap the benefits of the goodwill associated  
 13 with IN-N-OUT BURGERS' Registered Marks.

14      38. IN-N-OUT SMOG CHECK's infringing acts have caused, and will  
 15 continue to cause, IN-N-OUT BURGERS to suffer irreparable injuries to its  
 16 reputation and good will. IN-N-OUT BURGERS does not have an adequate  
 17 remedy at law to recover for this harm, and therefore, IN-N-OUT BURGERS is  
 18 entitled to injunctive relief.

19       WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and  
 20 that is Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK  
 21 from any further use of the Infringing Marks and any further use of a colorable  
 22 imitation of the Registered Marks.

23       **COUNT II – FEDERAL UNFAIR COMPETITION**

24       **TITLE 15 U.S.C. § 1125**

25      39. Paragraphs 1 - 38 are incorporated herein by reference.

26      40. Upon information and belief, IN-N-OUT SMOG CHECK's  
 27 unauthorized use of a colorable imitation of the Marks-at-issue constitutes a false  
 28

1 designation of origin, a false or misleading description of fact, and/or false or  
 2 misleading representation of fact, and has caused and is likely to cause confusion,  
 3 mistake, and/or deception as to the following:

- 4 a. the affiliation, connection or association of IN-N-OUT  
     5 SMOG CHECK with IN-N-OUT BURGERS;
- 6 b. the origin, sponsorship, or approval of IN-N-OUT  
     7 BURGERS of IN-N-OUT SMOG CHECK; and
- 8 c. the nature, characteristics, or qualities of IN-N-OUT  
     9 SMOG CHECK's goods and services.

10 41. The aforesaid acts constitute Federal Unfair Competition in violation  
 11 of 15 U.S.C. § 125(a).

12 WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and  
 13 that is Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK  
 14 from any further use of the Infringing Marks and any further use of a colorable  
 15 imitation of the Registered Marks.

16 **COUNT III- TRADEMARK INFRINGEMENT (CALIFORNIA LAW)**  
 17 **(CAL. BUS. & PROF. CODE § 14335)**

18 42. Paragraphs 1 - 41 are incorporated herein by reference.

19 43. Section 14335 of the California Business & Professions Code  
 20 authorizes this Court to enjoin any infringing use of a mark registered under Title  
 21 15 of the U.S. Code.

22 44. The Registered Marks are registered under Title 15 of the U.S. Code.

23 45. IN-N-OUT BURGERS exclusively owns the Registered Marks.

24 46. IN-N-OUT BURGERS has used the Registered Marks in interstate  
 25 commerce in connection with the advertising and promotion of its restaurant goods  
 26 and services and financial sponsorship of automobiles and the automotive racing  
 27 industry.

47. IN-N-OUT SMOG CHECK has used a colorable imitation of the Registered Marks in interstate commerce in connection with the rendering of emissions control and smog checking services at Defendants' Locations.

48. Upon information and belief, IN-N-OUT SMOG CHECK's unauthorized use of a colorable imitation of the Registered Marks has caused, and will likely cause, confusion in the relevant consumer market.

7       49. Upon information and belief, IN-N-OUT SMOG CHECK's  
8 unauthorized use of colorable imitations of the Registered Marks constitutes false  
9 designation of origin, false or misleading description of fact, and/or false or  
10 misleading representation of fact, and has caused and is likely to cause confusion,  
11 mistake, and/or deception as to the following:

- a. the affiliation, connection or association of IN-N-OUT SMOG CHECK with IN-N-OUT BURGERS;
- b. the origin, sponsorship, or approval of IN-N-OUT BURGERS of IN-N-OUT SMOG CHECK; and
- c. the nature, characteristics, or qualities of IN-N-OUT SMOG CHECK's goods and services.

50. IN-N-OUT SMOG CHECK's false designations, descriptions, and representations were made deliberately and with knowledge of their falsity.

51. IN-N-OUT SMOG CHECK acted in bad faith and/or willfully in adopting a colorable imitation of the Registered Marks in an effort to reap the benefits of the goodwill associated with IN-N-OUT BURGERS' Registered Marks.

52. IN-N-OUT SMOG CHECK's infringing acts have caused, and will continue to cause, IN-N-OUT BURGERS to suffer irreparable injuries to its reputation and good will. IN-N-OUT BURGERS does not have an adequate remedy at law to recover for this harm, and therefore, IN-N-OUT BURGERS is entitled to injunctive relief.

1 WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and  
 2 that is Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK  
 3 from any further use of the Infringing Marks and any further use of a colorable  
 4 imitation of the Registered Marks.

5 **COUNT IV – UNFAIR COMPETITION (CALIFORNIA LAW)**  
 6 **(CAL. BUS. & PROF. CODE § 17200)**

7 53. Paragraphs 1 – 52 are incorporated herein by reference.  
 8 54. IN-N-OUT BURGERS owns and enjoys rights in California and other  
 9 jurisdictions throughout the United States in the Marks-at-issue.

10 55. IN-N-OUT BURGERS has used the Marks-at-issue in intra and  
 11 interstate commerce in connection with the advertising and promotion of its  
 12 restaurant goods and services and financial sponsorship of automobiles and the  
 13 automotive racing industry.

14 56. IN-N-OUT SMOG CHECK has used a colorable imitation of the  
 15 Registered Marks in interstate commerce in connection with the rendering of  
 16 emissions control and smog checking services at Defendants' Locations.

17 57. Upon information and belief, IN-N-OUT SMOG CHECK's  
 18 unauthorized use of a colorable imitation of the Registered Marks has caused, and  
 19 will likely cause, confusion in the relevant consumer market.

20 58. Upon information and belief, IN-N-OUT SMOG CHECK's  
 21 unauthorized use of colorable imitations of the Registered Marks constitutes false  
 22 designation of origin, false or misleading description of fact, and/or false or  
 23 misleading representation of fact, and has caused and is likely to cause confusion,  
 24 mistake, and/or deception as to the following:

- 25 a. the affiliation, connection or association of IN-N-OUT  
 26 SMOG CHECK with IN-N-OUT BURGERS;
- 27 b. the origin, sponsorship, or approval of IN-N-OUT  
 28 BURGERS of IN-N-OUT SMOG CHECK; and

c. the nature, characteristics, or qualities of IN-N-OUT SMOG CHECK's goods and services.

59. IN-N-OUT SMOG CHECK's false designations, descriptions, and representations were made deliberately and with knowledge of their falsity.

60. IN-N-OUT SMOG CHECK acted in bad faith and/or willfully in adopting a colorable imitation of the Registered Marks in an effort to reap the benefits of the goodwill associated with IN-N-OUT BURGERS' Registered Marks.

61. IN-N-OUT SMOG CHECK's infringing acts have caused, and will continue to cause, IN-N-OUT BURGERS to suffer irreparable injuries to its reputation and good will. IN-N-OUT BURGERS does not have an adequate remedy at law to recover for this harm, and therefore, IN-N-OUT BURGERS is entitled to injunctive relief.

62. IN-N-OUT SMOG CHECK's actions constitute Unfair Competition under the Statutory Law of California, including Cal. Bus. & Prof. Code § 17200, et seq.

WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and that this Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK from any further use of the Infringing Marks and any further use of a colorable imitation of the Registered Marks.

**COUNT V – UNFAIR COMPETITION  
(CALIFORNIA COMMON LAW)**

63. Paragraphs 1 – 62 are incorporated herein by reference.

23 64. IN-N-OUT BURGERS owns and enjoys rights in California and other  
24 jurisdictions throughout the United States in the Marks-at-issue.

25        65. IN-N-OUT BURGERS has used the Marks-at-issue in intra and  
26        interstate commerce in connection with the advertising and promotion of its  
27        restaurant goods and services and financial sponsorship of automobiles and the  
28        automotive racing industry.

66. IN-N-OUT SMOG CHECK has used a colorable imitation of the Registered Marks in interstate commerce in connection with the rendering of emissions control and smog checking services at Defendants' Locations.

67. Upon information and belief, IN-N-OUT SMOG CHECK's unauthorized use of a colorable imitation of the Registered Marks has caused, and will likely cause, confusion in the relevant consumer market.

68. Upon information and belief, IN-N-OUT SMOG CHECK's unauthorized use of colorable imitations of the Registered Marks constitutes false designation of origin, false or misleading description of fact, and/or false or misleading representation of fact, and has caused and is likely to cause confusion, mistake, and/or deception as to the following:

- a. the affiliation, connection or association of IN-N-OUT SMOG CHECK with IN-N-OUT BURGERS;
- b. the origin, sponsorship, or approval of IN-N-OUT BURGERS of IN-N-OUT SMOG CHECK; and
- c. the nature, characteristics, or qualities of IN-N-OUT SMOG CHECK's goods and services.

69. IN-N-OUT SMOG CHECK's false designations, descriptions, and representations were made deliberately and with knowledge of their falsity.

70. IN-N-OUT SMOG CHECK acted in bad faith and/or willfully in adopting a colorable imitation of the Registered Marks in an effort to reap the benefits of the goodwill associated with IN-N-OUT BURGERS' Registered Marks.

71. IN-N-OUT SMOG CHECK's infringing acts have caused, and will continue to cause, IN-N-OUT BURGERS to suffer irreparable injuries to its reputation and good will. IN-N-OUT BURGERS does not have an adequate remedy at law to recover for this harm, and therefore, IN-N-OUT BURGERS is entitled to injunctive relief.

1           72. IN-N-OUT SMOG CHECK's actions constitute Unfair Competition in  
 2 violation of California Common Law of Unfair Competition.

3           WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and  
 4 that the Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK  
 5 from any further use of the Infringing Marks and any further use of a colorable  
 6 imitation of the Registered Marks.

7           **COUNT VI – DILUTION UNDER CALIFORNIA LAW**  
 8           **(CAL. BUS. & PROF. CODE § 14330)**

9           73. Paragraphs 1 – 72 are incorporated herein by reference.

10          74. Upon information and belief, IN-N-OUT SMOG CHECK's use of the  
 11 Marks-at-issue has harmed IN-N-OUT BURGERS and its business reputation and  
 12 has caused, and continues to cause, dilution by lessening the capacity of the Marks-  
 13 at-issue to identify and distinguish IN-N-OUT BURGERS' goods and services  
 14 from the goods and services of others.

15          75. Upon information and belief, the infringing acts of IN-N-OUT SMOG  
 16 CHECK have impaired, and continue to impair, the distinctive quality of the Marks-  
 17 at-issue.

18          76. Upon information and belief, the infringing acts of IN-N-OUT SMOG  
 19 CHECK have injured, and continue to injure, the business reputation of IN-N-OUT  
 20 BURGERS.

21          77. The foregoing infringing acts of IN-N-OUT SMOG CHECK constitute  
 22 actionable dilution under California Business and Professions Code §14330.

23          78. IN-N-OUT SMOG CHECK acted in bad faith and/or willfully in  
 24 adopting a colorable imitation of the Marks-at-issue in an effort to reap the benefits  
 25 of the goodwill associated with IN-N-OUT BURGERS' Marks-at-issue.

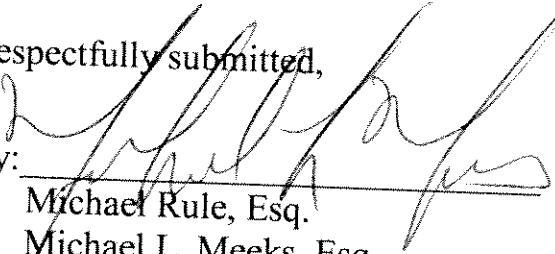
26          79. IN-N-OUT SMOG CHECK's infringing acts have caused, and will  
 27 continue to cause, IN-N-OUT BURGERS to suffer irreparable injuries as a result of  
 28 the impairment of the distinctiveness of the Marks-at-issue. IN-N-OUT BURGERS

1 does not have an adequate remedy at law to recover for this harm, and therefore,  
2 IN-N-OUT BURGERS is entitled to injunctive relief.

3 WHEREFORE, IN-N-OUT BURGERS requests judgment in its favor and  
4 that the Court enter a Permanent Injunction enjoining IN-N-OUT SMOG CHECK  
5 from any further use of the Infringing Marks and any further use of a colorable  
6 imitation of the Registered Marks.

7  
8 Dated: October 23, 2007

Respectfully submitted,

9  
10 By: 

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29  
30 Attorneys for IN-N-OUT BURGERS

31  
32 \* Motion to Admit Pro Hac Vice to be filed simultaneously.

**JURY DEMAND**

Plaintiff IN-N-OUT BURGER hereby demands a jury trial on all issues for which a jury trial is available.

Dated: October 23, 2007

Respectfully submitted,

By

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